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Supreme Court, U.S.
FILED
MAR 5 1993
OFFICE OF THE CLERK

No. 92-725

In The

Supreme Court of the United States

October Term, 1992

SALVADOR GODINEZ, Warden,

Petitioner,

v.

RICHARD ALLAN MORAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether inquiry into a defendant's competence to stand trial as enunciated in *Dusky v. United States*, 362 U.S. 402 (1960) is constitutionally adequate to determine a capital defendant's mental competence to plead guilty, waive the assistance of counsel and forego the presentation of mitigating evidence at the penalty phase of a capital sentencing proceeding.

2. Whether the federal courts are bound by the presumption of correctness applicable to state court factual findings (28 U.S.C. §2254(d)) in the determination of the competence and voluntariness of a capital defendant's guilty plea and waiver of counsel where the state courts applied an incorrect legal standard, where material facts were not adequately developed in the state proceeding and where the record as a whole does not support the state court's determination.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 1

STATEMENT 2

A. The Psychiatric Evaluations..... 3

B. The Plea and Sentencing Proceedings 5

C. State Postconviction Proceedings..... 10

D. Federal Habeas Corpus Proceedings 12

SUMMARY OF ARGUMENT..... 16

POINT I

A FINDING OF COMPETENCE TO STAND TRIAL IS NOT CONSTITUTIONALLY ADEQUATE TO DETERMINE A CAPITAL DEFENDANT'S COMPETENCE TO PLEAD GUILTY, WAIVE COUNSEL AND WAIVE PRESENTATION OF MITIGATING EVIDENCE AT SENTENCING ABSENT PARTICULARIZED INQUIRY INTO THE DEFENDANT'S COMPETENCE AS WELL AS VOLUNTARINESS IN WAIVING THOSE RIGHTS 19

A. Mental Competence In The Context Of Waiver of Rights..... 22

TABLE OF CONTENTS – Continued

Page

B. The Trial Court's Plea Inquiry Was Wholly Inadequate To Ascertain Respondent's Competence And Voluntariness In Pleading Guilty And Waiving Counsel 34

POINT II

THE FEDERAL COURT PROPERLY MADE AN INDEPENDENT DETERMINATION OF COMPETENCE AND VOLUNTARINESS WHERE THE STATE COURTS RELIED ON AN INCORRECT LEGAL STANDARD, WHERE MATERIAL FACTS WERE NOT ADEQUATELY DEVELOPED AND WHERE THE RECORD AS A WHOLE DID NOT SUPPORT THE STATE'S DETERMINATION 42

CONCLUSION 47

TABLE OF AUTHORITIES

Page

CASES

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 19

Allard v. Helgemoe, 572 F.2d 1 (1st Cir. 1978) 25

Blackmon v. Armontrout, 875 F.2d 164 (8th Cir. 1989) 29

Bouchillon v. Collins, 907 F.2d 589 (5th Cir. 1990) 44

Boykin v. Alabama, 395 U.S. 238 (1969) ..... *passim*

Brookhart v. Janis, 384 U.S. 1 (1966) 19

Carnley v. Cochran, 369 U.S. 506 (1962) 24

Chapman v. United States, 553 F.2d 886 (5th Cir. 1977) 29

Chavez v. United States, 656 F.2d 512 (9th Cir. 1981) 34

Clemons v. Mississippi, 494 U.S. 738 (1990) 33

Coleman v. Thompson, 111 S.Ct. 2546 (1991) 20

Collins v. Youngblood, 497 U.S. 37 (1990) 33

de Kaplany v. Enomoto, 540 F.2d 975 (9th Cir. 1976) 34

Demosthenes v. Baal, 495 U.S. 731 (1990) 27

Drope v. Missouri, 420 U.S. 162 (1975) ..... *passim*

Dusky v. United States, 362 U.S. 402 (1960) ..... *passim*

Estelle v. Williams, 425 U.S. 501 (1976) 20

Evans v. Raines, 800 F.2d 884 (9th Cir. 1986) 29

Faretta v. California, 422 U.S. 806 (1975) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986) 22

Francis v. Henderson, 425 U.S. 536 (1976) 20

Frendak v. United States, 408 A.2d 364 (D.C. 1979) 30

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Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981) 46

Henry v. Mississippi, 379 U.S. 443 (1965) 20

Johnson v. Zerbst, 304 U.S. 458 (1938) ..... *passim*

Jones v. Barnes, 463 U.S. 745 (1983) 20, 31

Lenhard v. Wolff, 443 U.S. 1306 (1979) 27

Maggio v. Fulford, 462 U.S. 111 (1983) 18, 44

Marshall v. Lonberger, 459 U.S. 422 (1983) 43, 44

Massey v. Moore, 348 U.S. 105 (1954) 24, 32

Matusiak v. Kelly, 786 F.2d 536 (2d Cir. 1986) . 29, 44, 46

Maynard v. Cartwright, 486 U.S. 356 (1988) 33

McCarlo v. State, 677 P.2d 1268 (Alaska Ct. App. 1984) 30

McCarthy v. United States, 394 U.S. 459 (1969) 20, 22

Medina v. California, 112 S.Ct. 2572 (1992) 22

TABLE OF AUTHORITIES – Continued

Page

Miller v. Fenton, 474 U.S. 104 (1985) 43, 44

North Carolina v. Alford, 400 U.S. 25 (1970) 20, 31

Parke v. Raley, 113 S.Ct. 517 (1992) 33

Pate v. Robinson, 383 U.S. 375 (1966) ..... *passim*

Patterson v. Illinois, 487 U.S. 285 (1988) 21, 27, 28

Penson v. Ohio, 488 U.S. 75 (1988) 20

People v. Chadd, 621 P.2d 837 (Cal. 1981) 30, 40

Riggins v. Nevada, 112 S.Ct. 1810 (1992) 23, 35

Rock v. Arkansas, 483 U.S. 44 (1987) 19

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Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985) 38

Saddler v. United States, 531 F.2d 83 (2d Cir. 1976) 34

Schoeller v. Dunbar, 423 F.2d 1183 (9th Cir. 1970) 25

Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973) .... *passim*

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State v. Chavis, 644 P.2d 1202 (Wash. Ct. App. 1982) 41

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

Wainwright v. Sykes, 433 U.S. 72 (1977) 20, 28

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Page

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TABLE OF AUTHORITIES – Continued

Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 972 F.2d 263. The memorandum decision and order of the district court (Pet. App. B1-B22) is unreported. The opinion of the Supreme Court of Nevada affirming the conviction (Pet. App. C1-C16) is reported at 103 Nev. 138, 734 P.2d 712. The order of the state district court denying postconviction relief (Pet. App. D1-D12) is unreported. The order of the Supreme Court of Nevada dismissing the appeal (Pet. App. E1-E7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992 (Pet. App. A1). The petition for a writ of certiorari was filed on October 16, 1992 and was granted on December 14, 1992 (J.A. 1-2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * * .

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

by an impartial jury * * * , and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> * * * No State shall * * * deprive any person of life, liberty, or property without due process of law; * * * .

STATEMENT

Respondent Richard Allan Moran is presently under sentence of death after having been permitted by the State of Nevada to (a) plead guilty, (b) waive his right to trial counsel or standby counsel, and (c) adamantly refuse to allow the presentation of evidence in mitigation of the three death sentences imposed on him by the Eighth Judicial District Court, Clark County, Nevada, on January 21, 1985. (Pet. App. C1).[1]

At the time he appeared for initial arraignment before the Nevada courts on September 4 and 5, 1984, respondent was still recovering from a suicide attempt in

[1] On appeal, the Supreme Court of Nevada reduced one of the death sentences to a term of life imprisonment without parole due to the improper inclusion of two aggravating circumstances in the three-judge sentencing court's penalty determination (Pet. App. C9-C12). The death sentences imposed on the other two murders were affirmed (Pet. App. C12-C14).

which he had slashed his wrists and shot himself in the abdomen in the aftermath of having shot and killed his former wife Linda Vandervoort without apparent provocation on August 11, 1984. (Pet. App. B3-B4). The murder of his wife was preceded nine days earlier by the shooting – also without apparent provocation – of a bartender and customer at the Red Pearl Saloon in Carson City, Nevada on August 2, 1984. (*Id.*). At the time of these crimes, respondent, an individual with no significant prior criminal history, was abusing cocaine, methaqualone (Quaaludes) and alcohol, and had been consuming approximately two to three grams per day of cocaine. (J.A. 4-6; 11-12; 16).

Arraigned on three counts of first-degree murder and other crimes, respondent acted against the advice of his attorneys and waived his right to preliminary hearings on all three homicides. (Pet. App. B4). The trial court ordered him to be examined by two psychiatrists for the purpose of determining his competency to stand trial.

A. The Psychiatric Evaluations

Dr. Jack A. Jurasky interviewed respondent on September 17, 1984. (J.A. 3-9). He recounted respondent's long history of alcohol abuse and his heavy cocaine use in the period immediately preceding the three homicides (*id.* at 4-5). His alcohol abuse contributed to the break up of his marriage in October 1983 and had led to episodes of amnesia as well as an alcohol-induced seizure in February 1984. It was at that time that he switched to cocaine (*id.* at 5-6). Noting that respondent manifested no hostility nor in any way attempted to excuse himself or justify

his behavior (*id.* at 6-7), Dr. Jurasky characterized respondent's affect as "depressed but appropriate. Mood was sad and moderately depressed. He wept on two occasions when talking about the victims" (*id.* at 7).

Significantly, while concluding that respondent was "in full control of his faculties" insofar as his ability to aid counsel, assist in his own defense, recall evidence and to give testimony if called upon to do so (*id.* at 8), Dr. Jurasky nonetheless concluded (*id.* at 8-9):

> *Psychologically, and perhaps legally speaking, this man, because he is expressing and feeling considerable remorse and guilt, may be inclined to exert less effort towards his own defense* but I do not feel that it is necessarily a major consideration. It is the story of an ordinarily law-abiding intelligent member of society who became involved with alcohol and drugs to such an extent that he lost his wife, his job, and placed his entire future in serious jeopardy. (emphasis added).

Dr. William D. O'Gorman interviewed respondent on September 12, 1984. (J.A. 10-17). Dr. O'Gorman similarly recounted respondent's long history of drug and alcohol abuse, which led to the loss of his job at the Bingo Palace in February 1984 after five and one-half years of steady employment (*id.* at 11) as well as to a subsequent cocaine-induced seizure on August 28, 1984 while awaiting arraignment (*id.* at 12). He also reported respondent's heavy use of cocaine in the ten day period preceding the Red Pearl homicides (*id.* at 11-12) and noted respondent's

suicide attempt, reporting respondent's desire to kill his ex-wife along with himself "in order that she would be with him, when he died, and he would not be alone" (*id.* at 10).

Dr. O'Gorman characterized respondent as "quite factual and open, but very depressed and showed much tearing in talking about the episodes that led up to his present incarceration, particularly in talking about his ex-wife" (*id.* at 15-16). He further noted that respondent "has acknowledged the abnormalities of his behavior, and *he expresses a desire to accept capital punishment*" (*id.* at 16) (emphasis added). His report concluded that, "the patient is knowledgeable of the charges being made against him. He can assist his attorney in his own defense, *if he so desires.* He is fully cognizant of the penalties if convicted." (*Id.* at 17) (emphasis added).

B. The Plea and Sentencing Proceedings

On November 28, 1984, respondent next appeared before the trial court and at that time sought to withdraw his not guilty pleas and to plead guilty to all three counts of capital murder. (J.A. 19). Respondent also sought to discharge his counsel and thenceforth proceed *pro se* at the penalty phase of the proceedings (*id.* at 19-20). His stated reason was to prevent counsel from preparing and presenting any evidence in mitigation of the potential death sentences he faced on all three charges (*id.* at 32). Respondent wished to ensure that *no* mitigation evidence would be presented on his behalf (*id.*).

The trial judge thereupon inquired of the Public Defenders as to respondent's competence. (J.A. 20-21).

They provided the court with a copy of Dr. Jurasky's report (*id.*). While Dr. O'Gorman's report had not yet been prepared or submitted, the Public Defenders informed the court that they had spoken to Dr. O'Gorman and represented that "his findings are similar to Dr. Jurasky's" (*id.*).[2] Based upon Dr. Jurasky's report and counsels' representations regarding Dr. O'Gorman, the trial court thenceforth found respondent not only competent to "understand the nature of the . . . charges against him" and "to assist in his defense," but also that he "knows the consequences of entering a plea of guilty to the charges; and that he can intelligently and knowingly waive his constitutional right to assistance of an attorney." (*id.* at 21).[3]

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[2] The record is unclear whether the trial court actually ever saw Dr. O'Gorman's report, which was dated November 28, 1984 – the same date as respondent's guilty plea and waiver of counsel. Certainly, the plea minutes indicate that the court had not seen it at the time it accepted respondent's plea and waiver nor did counsel bring to the court's attention Dr. O'Gorman's conclusions that respondent was "very depressed" and "expresses a desire to accept capital punishment." (J.A. 15-16).

[3] Ironically, as noted by the court of appeals (Pet. App. A20-A21), the trial court made these latter two competency findings despite the fact that neither Dr. Jurasky nor Dr. O'Gorman evaluated respondent with respect to his abilities to understand the consequences of pleading guilty and waiving counsel in a capital case. *Compare Westbrook v. Arizona*, 384 U.S. 150 (1966) (competence to waive counsel calls for separate inquiry from competence to stand trial). Indeed, Dr. Jurasky's expressed suspicions as to the possible negative impact of respondent's remorse upon his ability to exert effort towards his own defense as well as Dr. O'Gorman's observation – unknown to the trial judge at the time he made his contrary finding – that respondent desired to accept capital punishment as a result of his severe depression renders the trial court's conclusory competency determination highly suspect.

The trial court thereupon conducted a canvass of respondent as to his waiver of his right to counsel. While ascertaining that respondent was a thirty year old high school graduate with no prior court experience (*id.* at 30), the court learned that respondent sought to discharge counsel and represent himself for quite unorthodox reasons, particularly in a capital case (*id.* at 32):

> [T]he Public Defenders and myself don't agree on the way they should defend me.
>
> * * *
>
> I don't want them to present any mitigating evidence. I don't want this presented, and they have to – they feel that they have to.

Immediately thereafter, when the trial court inquired whether he was under the influence of any drugs or alcohol, respondent replied (*id* at 33):

> Just what they give me in, you know, medication.

Significantly, the trial court asked no follow up questions in order to ascertain what specific medications respondent was presently taking, their dosages, the duration he had been on these medications and their possible impact on (or impairment of) his cognitive and volitional abilities at this most crucial stage of the trial proceedings. Instead, it simply proceeded to inquire whether respondent desired standby counsel (*id.* at 33).[4] The remainder

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[4] In point of fact, respondent was heavily medicated during the plea proceedings, having been placed on the prescription

of the waiver and plea colloquy consisted virtually entirely of respondent's largely monosyllabic responses to the trial court's catechismic enumeration of rights being waived and stock inquiries into promises or threats that might render the plea or waiver involuntary (*id* at 25-34, 39-40, 54-56; Pet. App. A9, A13-A14).

It is noteworthy that despite the fact that, for all intents and purposes, respondent was effectively "volunteering" for the imposition of three death sentences,[5] at no point in the plea and waiver proceedings did the trial court ever see fit to inquire into respondent's emotional comprehension and state of mind in discharging counsel, pleading guilty and refusing to present mitigating evidence to the sentencing court. Rather, the court contented itself simply with informing respondent of the rights he was waiving, inquiring whether he understood them and ascertaining whether any external forces – e.g., promises, threats, or the like – were exercising any undue influence on his decision.

At a subsequent hearing on December 17, 1984, the trial court once again advised respondent that it was "unwise" of him to waive his right to counsel and afforded him the opportunity to withdraw his guilty

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medications Phenobarbital, Dilantin, Inderal and Vistaril at the jail where he was being detained prior to trial. He was not taken off these medications until he was moved to state prison after sentencing, at which time he later testified that his head cleared (and for the first time he sought out counsel to prosecute an appeal from his conviction) (4/20/88 Tr. 32-35).

[5] *See* Welsh S. White, *The Death Penalty in the Nineties* ch. 8 (Defendants Who Elect Execution) (1991).

pleas. (12/17/84 Tr. 2). Respondent reiterated that he did not wish to reconsider either his guilty pleas or his waiver of counsel and that he did not want to present any witnesses in his behalf at the penalty phase. (*Id.* at 2-3).

On January 21, 1985, a capital sentencing hearing was held before a panel of three judges, pursuant to Nev. Rev. Stat. Ann. §175.552. At that hearing, respondent declined to cross-examine the State's witnesses or object to any of the evidence proffered by the State. Nor did he present any mitigating evidence in his behalf or make a closing statement in his behalf.[6] The three judge panel thereupon sentenced him to death on each of the three murder charges. (1/21/85 Tr. 165-66).

On March 31, 1987, the Supreme Court of Nevada affirmed respondent's death sentences for the Red Pearl Saloon murders but reversed the death sentence for the murder of his former wife, overturning the aggravating factors found by the sentencing panel and directing the imposition of a life sentence. Pet. App. C1-C16.

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[6] *Cf.* Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 Tenn. L. Rev. 95 (1987); Eric Rieder, Note, *The Right of Self-Representation in the Capital Case*, 85 Colum. L. Rev. 130, 152-53 (1985) (the state's interest in avoiding arbitrary executions justifies the appointment of counsel over a defendant's objection at capital sentencing proceedings).

C. State Postconviction Proceedings

In July 1987, respondent sought postconviction relief in the Nevada state courts, arguing that his guilty pleas were involuntarily entered because he was under the influence of drugs at the time of the plea and because he was mentally incompetent to represent himself at the plea hearings. Pet. App. D2-D3, D6-D7.

At the evidentiary hearing held in state court, respondent testified that the reason he sought to have his public defenders dismissed was to prevent them from presenting any mitigating circumstances in the penalty phase of his trial to ensure that he received a death sentence. (4/20/88 Tr. 32-33). In response to the question whether it was his desire to represent himself or simply to end the proceedings and his life, respondent replied: "It wasn't – I didn't want to really represent myself. I was making sure that nobody was representing me." (*Id.* at Tr. 33).

Respondent also testified to having been administered Inderal, Dilantin, Phenobarbital and Vistaril in the Clark County Detention Center at the time of his plea (*id.* at Tr. 34) and to their impact on his mentation and mood (*id.* at Tr. 35):

> Q. [D]o you recall whether those drugs or medications had any affect upon your ability to know what was going on?
>
> A. I didn't think they did at the time because I was on the drugs. But now when I wasn't on them anymore, I could see that they, you know, had an affect on me.
>
> Q. And what affect did they have?

> A. I wouldn't know how to describe it. I guess I really didn't care about anything, you know, it wasn't – I wasn't very concerned about anything that was going on, you know, as far as the proceedings and everything were going.
>
> Q. And when did you get off of that medication?
>
> A. In the state prison.[7]

Relying on the facial sufficiency of the court's colloquy at the original plea proceedings, the state court rejected respondent's claims. Pet. App. D1-D12. Despite respondent's uncontroverted testimony as to his severe depression and the impact of the mood altering medications upon him as well as the corroborative medical records he introduced, the state postconviction court ruled that "defendant did not present evidence as to the effect on him of any drugs he may have ingested prior to the entry of the plea." *Id.* at D8. The state court also summarily rejected respondent's claim that he was mentally incompetent to represent himself, relying on the fact that he had previously been examined by two psychiatrists who had declared him competent to stand trial. *Id.*

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[7] Respondent's testimony concerning the medications he received and their impact on him was corroborated by the introduction into evidence of his medical records from the Clark County Detention Center, reflecting the medication and dosages he received, as well as the relevant excerpts from the latest edition of the Physician's Desk Reference (PDR) (42d ed. 1988), setting forth the properties and side effects of each of these medications, among them confusion, light-headedness, depression, hallucinations, short-term memory loss, drowsiness, tremors and convulsions. (J.A. 97-98; Pet. App. A14 & n.4).

Respondent appealed to the Supreme Court of Nevada, which denied relief. Pet. App. E1-E7. The Supreme Court similarly placed principal reliance on the facial validity of the plea colloquy. *Id.* at E5-E6. While recognizing that respondent had informed the trial court that he had been on medication the day he pleaded guilty and waived counsel, the Supreme Court dismissed the trial court's failure to make further inquiry, noting that "nothing in the record of the canvass" suggested that the trial judge "needed to inquire further into the nature of the effect of the medication." *Id.* at E6. The court also ignored respondent's testimony and proffer of medical evidence at the postconviction hearing, concluding that respondent "presented no evidence in the postconviction hearing which necessarily established that the medication influenced him to such an extent that he was unable to understand the meaning and consequences of his plea." *Id.* at E6-E7.

D. Federal Habeas Corpus Proceedings

(a) In December 1989, respondent filed a petition for a writ of habeas corpus (28 U.S.C. §2254) in the United States District Court for the District of Nevada, which denied the petition without an evidentiary hearing. Pet. App. B1-B22. Relying exclusively on the state court record, the district court held that the guilty pleas and waivers were voluntarily entered. *Id.* at B12-B18. Noting that the record did not reflect that the trial judge, the prosecutors or the two attorneys initially appointed to represent respondent felt that his faculties were impaired because of medication (*id.* at B13-B14), the district court concluded that respondent had not demonstrated that the

effect of those medications on him were such that he could not freely and voluntarily change his plea to guilty and dispense with counsel. (*Id.* at B13).

(b) The United States Court of Appeals for the Ninth Circuit reversed and directed issuance of the writ of habeas corpus. Pet. App. A1-A28. The court of appeals held that at where a defendant waived his right to counsel as well as the full panoply of rights waived by pleading guilty (especially in a capital case), the inquiry into waiver demands the "utmost solicitude" from the courts. *Id.* at A11-A12, *citing Boykin v. Alabama,* 395 U.S. 238, 243 (1969). This inquiry is doubly important where there is a bona fide doubt about defendant's competency to waive rights. *Id.*

The court of appeals found that a bona fide doubt existed in this case. It took note of respondent's suicide attempt a few months before his plea hearing, as well as the pretrial psychiatric reports with their references to respondent's depression, guilt and remorse coupled with both psychiatrists' expressed concern as to whether this might interfere with respondent's willingness to defend himself. Pet. App. A8, A13, A25-A28. These doubts only increased when respondent subsequently appeared in court, given his obviously suicidal desire to plead guilty to three capital crimes and to discharge counsel to ensure that no mitigating evidence would be presented on his behalf at sentencing. *Id.* at A8-A9, A13-A14. Nor were these doubts assuaged by respondent's monosyllabic responses to the trial court's waiver colloquy as well as his having taken four different kinds of medication, about which the trial court made no inquiry whatsoever. *Id.* at A8-A9, A13-A14.

In light of these factors, the court of appeals held that the state court should have entertained a good faith doubt about respondent's competency to make a voluntary, knowing and intelligent waiver of his constitutional rights. *Id.* at A12-A15. Due process therefore required the state trial court to have held a contemporaneous hearing – not just the usual plea colloquy – to evaluate and determine respondent's competency to waive constitutional rights, plead guilty and dismiss counsel. *Id.* at A15.

The court of appeals further held that the state court's failure to conduct a proper contemporaneous inquiry into respondent's competency to waive constitutional rights at the plea hearing was not cured by the postconviction hearing held three years later, both because the state postconviction court's ruling was premised on the wrong legal standard of competency and because an examination of the record in light of the correct legal standard failed to sustain the state court's retrospective finding that respondent was competent to waive his legal rights. *Id.* at A15-A16.

Relying on a long line of Ninth Circuit precedent, the court of appeals held that "[c]ompetency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial." *Id.* at A19. A defendant is competent to waive constitutional rights, the court explained, only if he has the capacity for "reasoned choice" among the alternatives available to him, whereas he is competent to stand trial as long as he has "a rational and factual understanding of the proceedings and is capable of assisting his counsel." *Id.*

Analyzing the state postconviction court's competency determination, the court of appeals noted that the state court based its determination of respondent's competency to waive counsel solely on the basis of the earlier psychiatric evaluations of competency to stand trial. *Id.* at A20. This was improper, the court ruled, because both psychiatric examinations – which occurred several months before the plea colloquy – focused strictly on respondent's competence to stand trial. *Id.* "Neither doctor considered the question whether Moran was competent to waive counsel or to plead guilty. At the time of the examinations, Moran had not yet decided to do either, so the question of competency to waive constitutional rights was simply not before the doctors." *Id.* at A20-A21 & n.7.

Similarly, the state postconviction court's failure to articulate the standard of competency it used to evaluate respondent's competence to plead guilty (*id.* at A22), along with its single reference to the conventional standard for competence to stand trial, compelled the court of appeals to conclude that the state postconviction court applied the wrong legal standard to reach its conclusion that respondent was competent to plead guilty and waive counsel. *Id.* at A23-A24.

Independently analyzing the two psychiatric reports, the court of appeals noted that both reports recounted examinations occurring in September 1984, several months before respondent sought to discharge his attorneys and change his pleas. *Id.* at A25. Both reports focused entirely on respondent's mental state insofar as it related to his competence to stand trial, not his competence to waive counsel and plead guilty. *Id.* at A25-A28.

Moreover, neither report addressed the effects that medication would have on respondent's competence; thus, they were inadequate to resolve the question of the impact of respondent's heavily medicated condition on his competence to waive counsel and plead guilty. *Id.* at A27-A28.

Accordingly, finding the state courts to have applied an incorrect legal standard and considering the factual record in light of the appropriate standard, the court of appeals found it inadequate to demonstrate respondent's competence to plead guilty and waive counsel. *Id.* at A24-A28.

SUMMARY OF ARGUMENT

Certain rights of the accused are so fundamental to the fairness of the proceedings that they may not be waived absent the defendant's personal waiver. Among these are the right to counsel and the right to stand trial (or plead guilty). Trial courts are required to make detailed and probing personal inquiries before accepting waivers of these rights in order to determine that the waiver is knowing, intelligent and voluntary. A similar obligation extends to a defendant's mental competence to stand trial. Whenever evidence comes to light – from any source and at any stage of the proceedings – that casts a bona fide doubt on the defendant's competence, the trial court must conduct a thorough inquiry to determine if the defendant is impaired and unable to properly participate in the proceedings.

In this case, the court of appeals determined that a doubtfully competent capital defendant – who sought to plead guilty to three capital murder charges and discharge his lawyers to prevent them from presenting mitigating evidence in his behalf at sentencing – should not have been permitted to plead guilty and waive counsel absent a sufficiently exhaustive determination that he was mentally competent to make a "reasoned choice" among the alternatives available to him. The court of appeals held that where a doubtfully competent defendant sought to personally exercise his fundamental rights – and to exercise them in a patently self-destructive fashion – the general standard of mental competence – the ability to consult with counsel along with a rational and factual understanding of the proceedings – was inadequate to satisfy the high standard of voluntariness applicable to personal waivers of constitutional rights.

The court of appeals correctly applied decisions of this Court, including *Westbrook v. Arizona*, 384 U.S. 150 (1966), in requiring that a carefully particularized inquiry be made into any waiver of fundamental rights sought to be made by a defendant as to whom a bona fide doubt existed as to competence. Before accepting such a waiver, there must be an individualized functional inquiry into the defendant's mental state focused on the rights sought to be exercised or waived and an assessment of the factual and legal context in which the waiver occurs. Whether that inquiry be defined as a "higher" standard of competence (or "reasoned choice"), as suggested by the court of appeals, a contextualized inquiry into decisional competence, as suggested by commentators, or simply greater breadth of inquiry, as suggested in earlier

decisions of this Court, it clearly mandates that where a doubtfully competent defendant seeks to personally exercise or waive his rights, the judicial inquiry to be made must be extraordinarily penetrating and thorough.

In the case at bar, the court of appeals properly made an independent determination that the trial court erred in peremptorily accepting respondent's clearly suicidal guilty plea and waiver of counsel without having conducted a competency hearing as well as a far more exhaustive personal examination beyond the litany of the routine plea colloquy.

The ultimate issue of voluntariness of waiver of rights is a mixed fact-law determination. Where the state courts had not conducted an adequate hearing either at the plea or in postconviction proceedings in order to develop the material facts, where it employed a clearly incorrect legal standard and where the record as a whole failed to support its determination of respondent's competence and the voluntariness of his waivers, neither 2254(d)'s presumption of correctness or the *Maggio v. Fulford*, 462 U.S. 111 (1983) deference to be accorded state competency determinations required the court of appeals to defer to the state's determination in this case.

ARGUMENT

I. A FINDING OF COMPETENCE TO STAND TRIAL IS NOT CONSTITUTIONALLY ADEQUATE TO DETERMINE A CAPITAL DEFENDANT'S COMPETENCE TO PLEAD GUILTY, WAIVE COUNSEL AND WAIVE PRESENTATION OF MITIGATING EVIDENCE AT SENTENCING ABSENT PARTICULARIZED INQUIRY INTO THE DEFENDANT'S COMPETENCE AS WELL AS VOLUNTARINESS IN WAIVING THOSE RIGHTS

This Court has held repeatedly that a defendant possesses certain rights in a criminal trial that are so fundamental to the fairness of the proceedings that they may not be waived absent the personal participation and waiver of the defendant himself. *Johnson v. Zerbst*, 304 U.S. 458 (1938) (right to counsel); *Von Moltke v. Gillies*, 332 U.S. 708 (1948) (accord). Moreover, the defendant's waiver may not be inadvertent or accidental, but may be accepted by the trial court only where knowingly, intelligently and voluntarily made. *Id.* Among these fundamental rights are the right to counsel, the right to stand trial, the right to a jury trial and the right against self-incrimination. *Faretta v. California*, 422 U.S. 806 (1975) (waiver of counsel/assertion of right of self-representation); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (guilty plea); *Brookhart v. Janis*, 384 U.S. 1 (1966) (whether to plead guilty); *Rock v. Arkansas*, 483 U.S. 44 (1987) (whether to testify); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942) (waiver of jury trial). No defendant gives up these rights except where he personally surrenders them in a knowing, purposeful and voluntary

fashion. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *McCarthy v. United States*, 394 U.S. 459, 466 (1969).[8]

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[8] As noted in *Jones v. Barnes*, 463 U.S. 745, 751 (1983), four "fundamental decisions" are traditionally committed to the accused (pleading guilty, waiving a jury, testifying and taking an appeal) as well as the decision to act as his own advocate (and waive counsel). Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths – a Dead End?*, 86 Colum. L. Rev. 9, 10-12, 30-37 (1986) (contrasting roles of client and counsel in assertion and waiver of defendant's rights and management of defense); Edward L. Rubin, *Toward A General Theory of Waiver*, 28 UCLA L. Rev. 478, 491-504, 546-51 (1981); George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 260-68 (1977) (mental capacity to exercise waiver of rights).

Significantly, outside of those decisions specifically ear-marked for the defendant's personal assertion (and which call for particularized inquiry into defendant's waiver), the exercise and waiver of virtually all other rights of the accused are committed to the discretion of defense counsel, who may exercise or waive them with virtually no right of input from the defendant or the trial court and whose decisions ordinarily bind the accused. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977); *Estelle v. Williams*, 425 U.S. 501 (1976); *Francis v. Henderson*, 425 U.S. 536 (1976); *Henry v. Mississippi*, 379 U.S. 443, 451 (1965). Indeed, counsel's assertions (or waivers) of rights may bind the accused even when occurring negligently and inadvertently, *see Coleman v. Thompson*, 111 S. Ct. 2546 (1991), a standard that would never apply to defendant's personal waivers. Nevertheless, outside the context of those rights whose exercise is committed to the defendant's personal discretion, "it is through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (and authorities cited therein). As discussed *infra*, this distinction is of critical importance in determining whether a defendant who may be mentally competent to assist counsel is nonetheless incompetent to exercise his rights in his own behalf.

In order to ensure that these rights are sedulously protected, this Court has mandated that trial courts make detailed and probing inquiry of defendants before accepting their waivers. The trial courts are required not only to inform the defendant of the rights he is waiving, but must also ascertain whether his waiver is being made with his eyes open and of his own free will. *See Patterson v. Illinois*, 487 U.S. 285, 298-99 (1988) ("recognizing the enormous importance and role that an attorney plays at the criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial").

In *Von Moltke v. Gillies*, 332 U.S. at 723-24, the Court articulated the exhaustive thoroughness with which the trial court must determine that a defendant's waiver is both knowing and voluntary:

> [A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility . . . . A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.
>
> This case graphically illustrates that a mere routine inquiry – the asking of several standard questions followed by the signing of a standard written waiver of counsel form – may leave a

> judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel.

This same standard of probing inquiry applies as well in the context of assessing the voluntariness of a guilty plea (with its attendant waiver of virtually all of the defendant's trial rights). *Boykin v. Alabama*, 395 U.S. at 242-44 (same standard of inquiry for guilty plea as for waiver of counsel: "utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences"); *McCarthy v. United States*, 394 U.S. at 466 (waiver standard for guilty plea identical to *Zerbst* standard for waiver of counsel: "an intentional relinquishment or abandonment of a known right or privilege").[9]

A. Mental Competence in the Context of Waiver of Rights

No defendant may be tried (or permitted to waive his rights) who is not mentally competent to stand trial. *Medina v. California*, 112 S.Ct. 2572 (1992); *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Dusky v. United States*, 362 U.S. 402 (1960). As

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[9] *See Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1071-72 (11th Cir. 1986) (Atkins, J., dissenting) ("The mandatory nature of the *Faretta* inquiry is justified because the Court has recognized that a defendant's decision to go *pro se* is tantamount to pleading guilty – the process is just a little slower and perhaps mo[r]e painful").

Justice Kennedy observed in *Riggins v. Nevada*, 112 S.Ct. 1810, 1817 (1992) (Kennedy, J., concurring):

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

The standard set forth in *Dusky* requires that a defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" as well as "a rational as well as factual understanding of the proceedings against him." 362 U.S. at 402. In *Drope*, the Court applied the same standard in a state case, describing the test as whether the defendant possesses the capacity "to consult with counsel, and to assist in preparing his defense." 420 U.S. at 171.

Pate and *Drope* also place a continuing responsibility on the trial judge to investigate a defendant's mental competence to proceed, even absent objection by counsel, whenever evidence comes to light – from any source and at any stage of the proceedings – that casts a bona fide doubt on defendant's mental state and fitness to participate in the proceedings. *Pate*, 383 U.S. at 385-86; *Drope*, 420 U.S. at 179.

It is thus at the intersection of these two complementary lines of cases – those involving the close scrutiny required over both a defendant's personal waiver of fundamental rights as well as his mental competence to participate meaningfully in the proceedings – that the

Court's *per curiam* opinion in *Westbrook v. Arizona*, 384 U.S. 150 (1966) should be viewed.

In *Westbrook*, 384 U.S. at 150-51, the petitioner had received a hearing on his competence to stand trial but no hearing or inquiry whatever into his competence to waive counsel and conduct his own defense. Invoking the "protecting duty" requirement that it set out for the ascertainment of waivers of counsel in *Zerbst* and *Carnley v. Cochran*, 369 U.S. 506 (1962), the Court remanded for a plenary determination of whether this "protecting duty" had been fulfilled in light of *Pate*. *Id.* at 150-51. *Westbrook* held, in essence, that where a bona fide doubt existed as to a defendant's mental competence to stand trial, a separate and specific inquiry must also be made into the defendant's competence to waive fundamental rights where the defendant attempts such a waiver.

Westbrook thus reaffirmed the principle the Court had earlier recognized in *Massey v. Moore*, 348 U.S. 105 (1954), where it noted that a defendant "might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." *Id.* at 108.

Relying upon *Westbrook*, the Ninth Circuit in *Sieling v. Eyman*, 478 F.2d 211 (9th Cir. 1973), held that, even though a defendant may in fact be competent to stand trial, he may not necessarily be sufficiently competent to plead guilty. Rather than the *Dusky* standard of competence to assist counsel, the Ninth Circuit determined that a defendant's competence to waive rights must be assessed "with specific reference to the gravity of the decisions with which the defendant is faced." *Id.* at 215.

Sieling adopted the standard first formulated by Judge Hufstedler in her dissent in *Schoeller v. Dunbar*, 423 F.2d 1183, 1194 (9th Cir. 1970):

> A defendant is not competent to plead guilty if mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea.

While courts and commentators are in dispute as to whether *Westbrook* mandates a "higher" standard of competence for a defendant's personal waiver or exercise of rights,[10] at an irreducible minimum it stands for the principle that competence to stand trial is not a unidimensional one-size-fits-all concept. While a determination that a defendant is competent to stand trial might mean that ordinarily he was also competent to personally exercise and waive his rights, it does not automatically resolve the issue. Rather, there must be an individualized functional inquiry into a defendant's mental state focused on the rights sought to be exercised or waived and an

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[10] *Compare Sieling v. Eyman*, 478 F.2d at 214-15; *United States v. Masthers*, 539 F.2d 721, 726 & n.30 (D.C. Cir. 1976); *United States v. David*, 511 F.2d 355, 362 n.19 (D.C. Cir. 1975); Silten & Tullis, 28 Hastings L. J. at 1065-74 (competence to plead guilty and waive counsel requires "higher" standard of comprehension than competence to stand trial) *with Allard v. Helgemoe*, 572 F.2d 1 (1st Cir. 1978); *United States ex rel. Heral v. Franzen*, 667 F.2d 633 (7th Cir. 1981) (competence to stand trial is competence for all purposes). Although *cf.* Note, *Competence To Plead Guilty And To Stand Trial: A New Standard When A Criminal Defendant Waives Counsel*, 68 Va. L. Rev. 1139, 1140, 1151-55 (1982) (competence to stand trial not necessarily synonymous with competence to waive counsel; higher standard of scrutiny clearly required where uncounseled defendant seeks to plead guilty).

assessment of the factual and legal context in which the waiver occurs. *See Drope*, 420 U.S. at 176 ("a defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies"); *see also* Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 Behav. Sci. & L. 291, 298-301, 313 (1992); Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. Miami L. Rev. (forthcoming 1993).[11]

As early commentators have noted (Peter R. Silten & Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 Hastings L.J. 1053, 1068 (1977)):

> The defendant who waives counsel will be alone when it becomes necessary to decide whether to testify or to decide matters involving trial procedures and strategy. He must therefore be able to determine the alternatives available to him during the proceedings, to evaluate these choices, and to decide for himself what action to take. He will not have guidance from an attorney and cannot depend upon the court to provide the assistance he would receive if he had counsel. In this situation, it is clear that the defendant must have greater powers of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney.

Accordingly, given the scrupulous care with which guilty pleas and waivers of counsel ordinarily must be

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[11] Manuscript copies of Professor Bonnie's forthcoming Miami Law Review article are being placed on file with the Clerk.

scrutinized (*e.g., Zerbst, Von Moltke, Boykin, Faretta* and *Patterson*), the trial court must similarly exercise extraordinary vigilance before accepting a waiver of rights from a defendant as to whom there may be a bona fide doubt as to his mental competence. Whether that vigilance be defined as a "higher standard" or "reasoned choice," as the court of appeals has suggested (Pet. App. A19), a contextualized inquiry into decisional competence, as suggested by Professor Bonnie (10 Behav. Sci. & L. at 298-301; 47 U. Miami L. Rev.; Ms. at 15-17, 45-75) or simply greater breadth of inquiry (*Zerbst, Von Moltke, Westbrook*), it clearly mandates that where a doubtfully competent defendant seeks to personally exercise or waive his rights – particularly in a situation such as the case at bar, where he effectively seeks to exercise them in a patently self-destructive manner – the inquiry to be made must be extraordinarily penetrating and thorough. As formulated by the D.C. Circuit (*United States v. Masthers*, 539 F.2d at 726):

> A defendant's competency must be assessed "with specific reference to the gravity of the decisions with which [he] is faced." Whether an accused is capable of making the "reasoned choice" essential to the validity of a guilty plea and the waiver of constitutional rights such as the plea entails "depend[s] . . . upon the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." (Citations omitted).[12]

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[12] Death-waiver cases such as *Gilmore v. Utah*, 429 U.S. 1012 (1976); *Lenhard v. Wolff*, 443 U.S. 1306 (1979); and *Demosthenes v. Baal*, 495 U.S. 731 (1990) are not directly applicable in this con-

Commentators and courts recognize that competence is not a one-dimensional concept, but varies according to the factual and legal circumstances in which it is to be assessed (Bonnie, 10 Behav. Sci. & L. at 299):

> It is now axiomatic that a person may be competent for one purpose, such as decision-making about medical treatment, but not about others, such as the management of financial affairs. Tests of competence, and the procedures required to resolve doubts about competence, vary from context to context, depending upon both normative and practical considerations. Adherence to the idea that a criminal defendant is competent for all decision-making purposes, or for none, would be anomalous in the face of such a pervasive understanding.[13]

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text. These cases involve convicted defendants' post-trial waivers of appellate or postconviction review, not the waiver of trial rights at the "main event" of the criminal proceedings (*Wainwright v. Sykes*, 433 U.S. at 90), where such waivers must be strictly scrutinized. *Patterson v. Illinois*, 487 U.S. at 298-99.

[13] As one psychiatrist has framed the inquiry:

> In deciding competency, one should consider . . . whether competency for only a specific act is to be judged (e.g., executing a will or some particular business transaction). It is important that the psychiatrist not consider competence generally but understand that the question is, instead, 'competence for what particular purpose.' Therefore, his mental status examination should be tailored to throw light upon the specific question.

G. Ulett, *A Synopsis of Contemporary Psychiatry* 337-38 (5th ed. 1972) *quoted in* Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. Cal. L. Rev. 237, 308 n.249 (1974); *see also* G. Richard Strafer, *Volunteering For Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860, 876-86 (1983).

Indeed, while Petitioner notes that various courts have formally rejected the *Sieling* "reasoned choice" formulation with respect to guilty pleas,[14] it is instructive that many of those self-same courts have nonetheless, on a case-by-case basis, sustained findings that a defendant found competent to stand trial nonetheless may not be competent either to represent himself or to plead guilty, given the extraordinarily high standards required for waiver (or assertion) of these rights. *See, e.g., Blackmon v. Armontrout*, 875 F.2d 164 (8th Cir. 1989) (defendant competent to stand trial not competent to represent himself); *Matusiak v. Kelly*, 786 F.2d 536, 543-44 (2d Cir. 1986) (defendant competent to stand trial not competent to plead guilty); *United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 753 (2d Cir. 1975) (defendant competent to stand trial not competent to represent himself); *Government of Virgin Islands v. Niles*, 295 F. Supp. 266 (D.V.I. 1969) (defendant competent to stand trial not competent to represent himself); *State v. Shank*, 410 So. 2d 232, 233 (La. 1982) ("a defendant's election to represent himself for the

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[14] Although, as Judge Cudahy observed in *United States v. Clark*, 943 F.2d 775, 785-86 (7th Cir. 1991) (Cudahy, J., concurring), the majority of circuits have nonetheless read *Westbrock* as imposing a higher standard of competence on defendants seeking to discharge counsel and represent themselves. *See, e.g., United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 133 (2d Cir. 1975); *Chapman v. United States*, 553 F.2d 886, 892 n.10 (5th Cir. 1977); *United States v. McDowell*, 814 F.2d 245, 250 (6th Cir. 1987); *Blackmon v. Armontrout*, 875 F.2d at 166; *Evans v. Raines*, 800 F.2d 884, 885 (9th Cir. 1986).

purpose of acquiescing in his conviction of a capital offense and in his death sentence cannot be sanctioned as an intelligent choice"); *People v. Chadd*, 621 P.2d 837, 844 (Cal. 1981) (defendant's "suicidal" guilty plea and waiver of counsel in capital case overturned); *State v. Doss*, 568 P.2d 1054, 1058 (Ariz. 1977) (competent defendant "too emotionally disturbed to make knowing waiver" of counsel); *State v. Bauer*, 245 N.W.2d 848, 859 (Minn. 1976) (competent defendant's "paranoid distrust" of appointed counsel and judicial system renders waiver of counsel not knowing or intelligent); *McCarlo v. State*, 677 P.2d 1268, 1270 (Alaska Ct. App. 1984) (competent mental retardate not competent to plead guilty). *See also* Bonnie, 47 U. Miami L. Rev.; Ms. at 31 & n.72 (and cases collected therein).[15]

These cases clearly demonstrate that, irrespective of the formal test to be applied, competence to stand trial is not a uniform standard which necessarily enables a defendant to act in his own behalf without the guiding hand and assistance of counsel in the preparation and presentation of his defense. This may well explain the critical reference in *Dusky* and *Drope* to the necessity for a

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[15] Indeed, in the analogous context of assertion (or waiver) of the insanity defense, various courts have similarly held that a defendant's competence to stand trial *simpliciter* is not necessarily dispositive for all purposes and that particularized inquiry may be necessary in evaluating the defendant's competence to waive the defense where its assertion would otherwise be called for. *See Frendak v. United States*, 408 A.2d 364, 372-80 (D.C. 1979); *Treece v. State*, 547 A.2d 1054, 1057-63 (Md. 1988) (and authorities cited therein); *United States v. Wright*, 627 F.2d 1300, 1307 n.45, 1309-12 (D.C. Cir. 1980).

defendant to possess the capacity to "consult with counsel and to assist in preparing his defense." *Dusky*, 362 U.S. at 402; *Drope*, 420 U.S. at 171.

While the Sixth Amendment speaks of providing a defendant with "the Assistance of Counsel," the practical realities of criminal litigation suggest that, in point of fact, it is the defendant assisting counsel, who is charged with full responsibility for mounting the defense. *Jones v. Barnes*, 463 U.S. at 751; *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988). *See* Richard H. Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 Calif. L. Rev. 636, 638-49 (1977).[16]

Under these circumstances, and with counsel charged with the primary responsibility for asserting (and protecting) defendant's rights, Professor Bonnie's suggestion that a defendant's competence to assist counsel is not necessarily coextensive with his decisional competence to

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[16] Petitioner's (and the Solicitor General's) fears that acceptance of a "dual standard" could create an anomalous class of defendants competent to stand trial but not competent to plead guilty or waive counsel are wholly misplaced. If anything, refusal to allow a defendant to plead guilty or waive counsel because of doubts as to his competence would mean that the trial court was exercising its "protecting duty" (*Zerbst; Westbrook*) in assuring that all of the defendant's trial protections (including counsel) would be preserved in the interests both of the defendant and the integrity of the judicial process. Moreover, it should be remembered that a defendant adjudged incompetent cannot waive his rights (*Pate*, 383 U.S. at 386), there exists no constitutional right to plead guilty (*Alford*, 400 U.S. at 38 n.11) and even a defendant's constitutional right of self-representation is not absolute and may be supervened by compelling governmental interests (*Faretta*, 422 U.S. at 834 n.46).

exercise rights on his own behalf carries considerable force. Bonnie, 10 Behav. Sci. & L. at 294 ("a distinction between a foundational concept of competence to assist counsel and a contextualized concept of decisional competence."); Bonnie, 47 U. Miami L. Rev.; Ms. at 15-17, 45-75.

Clearly, as Professor Bonnie and *amicus* American Psychiatric Association *et al.* (APA Br. 11) recognize, what matters is not the precise wording of the test, but rather whether the formulation assures a sufficiently broad clinical and judicial inquiry into what the defendant understands and whether he can perform the tasks and functions required of him in the context of his case. Certainly, as numerous courts have already determined, there area not insubstantial number of defendants who may be competent to perform the tasks necessary to assist counsel in mounting their defense who would, nonetheless, be wholly unable to cope with the responsibilities and challenges facing them if they insisted upon going it alone. *Massey v. Moore*, 348 U.S. at 108. Nor have the lower courts found it particularly onerous in differentiating competence for different purposes. *See* cases cited *supra* at 29-30 & nn.14 & 15.

Accordingly, pursuant to *Westbrook*, the court of appeals correctly determined that particularized inquiry separate and apart from inquiry into competence to stand trial is constitutionally compelled where a doubtfully competent capital defendant sought to plead guilty to three murder charges and discharge counsel for the express purpose of preventing them from presenting mitigating evidence in his behalf. Mechanical application of

the *Dusky* standard, as relied upon by the state courts in this case, was wholly inadequate in that regard.[17]

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[17] Notwithstanding Petitioner's half-hearted suggestion, neither *Teague v. Lane*, 489 U.S. 288 (1989) nor its progeny have any application in this case. Pet. Br. at 22 n.1. In the first place, the State never before raised the *Teague* issue either in the lower federal courts or in its certiorari petition to this Court. The argument is thus waived. *Collins v. Youngblood*, 497 U.S. 37, 40-41 (1990) (*Teague* not jurisdictional; subject to waiver by State); *Parke v. Raley*, 113 S.Ct. 517, 521 (1992) (accord); *see also id.* at 522-23; *Yee v. City of Escondido*, 112 S.Ct. 1522, 1531-33 (1992) (failure to raise issue in lower courts or in certiorari petition deemed waiver). Significantly, neither the Solicitor General nor the Criminal Justice Legal Foundation, as *amici* in support of Petitioner, suggest that *Teague* or its progeny have any application in this case.

More to the point, the issue to be resolved in this case – the standard of care by which courts must scrutinize a doubtfully competent defendant's waivers of rights in the trial context – is a principle of long standing consideration by this Court, calling for the straight forward application of fundamental legal principles enunciated in cases long predating respondent's 1984 guilty plea and waiver of counsel; *e.g., Zerbst* (1938); *Pate* (1966); *Westbrook* (1966); *Boykin* (1969); *Drope* (1975); and *Faretta* (1975). Whatever the Court's ultimate decision, it would not constitute a "new rule" under *Teague*. *See, e.g., Stringer v. Black*, 112 S.Ct. 1130, 1135-40 (1992) (*Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Clemons v. Mississippi*, 494 U.S. 738 (1990) did not so extend precedent or break new ground, even when applied in different statutory or factual contexts, as to create new rules); *see especially Wright v. West*, 112 S.Ct. 2482, 2499 (1992) (Kennedy, J., concurring in the judgment) ("Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."); *see also id.* at 2497 (O'Connor, J., joined by Blackmun and Stevens, JJ., concurring in the judgment); *id.* at 2502 (Souter, J., concurring in the judgment.)

Indeed, the "reasoned choice" formulation enunciated in *Sieling v. Eyman, supra*, a federal habeas corpus case, has been the

B. The Trial Court's Plea Inquiry Was Wholly Inadequate To Ascertain Respondent's Competence And Voluntariness In Pleading Guilty And Waiving Counsel

In this case, the guilty plea and waiver of counsel were tendered by a defendant who the trial court knew from the pretrial psychiatric evaluations had attempted suicide several months earlier, was a chronic alcohol and drug abuser and whose psychiatric evaluations pronounced him seriously depressed, albeit mentally competent to proceed to trial, assuming – as did the psychiatric examiners – that he had the guiding hand of counsel at his side.[18]

When respondent stood before the trial court, however, he immediately sought to plead guilty to all charges and discharge counsel, setting forth his counsels' insistence on the presentation of mitigating evidence at sentencing as his reason for discharging them.

Nonetheless, despite this "flurry of warning flags" (*Saddler v. United States*, 531 F.2d 83, 87 (2d Cir. 1976)), the

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constitutional standard consistently applied in the Ninth Circuit since 1973 – well over a decade prior to respondent's 1984 plea and waiver. *See, e.g., Chavez v. United States*, 656 F.2d 512 (9th Cir. 1981); *de Kaplany v. Enomoto*, 540 F.2d 975, 985 (9th Cir. 1976) (en banc). Thus, its application in this case hardly constituted either the creation or retroactive application of a "new" rule.

[18] It should be remembered, as noted by the court of appeals (Pet. App. A25-A28), that the psychiatric evaluations never focused on respondent's competence to plead guilty, waive counsel or attempt a "suicidal" waiver of his trial rights because the issue had not yet arisen at that early stage of the proceedings.

trial court summarily found respondent competent without a hearing and accepted his guilty pleas and waivers after a plea colloquy of almost breath-taking brevity, characterized primarily by respondent's monosyllabic responses to a numbing litany of "yes/no" questions posed by the trial court.[19]

Given the constellation of symptoms presented by respondent – the severe depression, the suicide attempt, the chronic alcohol and drug abuse (particularly in the period immediately preceding the three murders), and the unspecified medication taken that day – the trial court erred in not having made further inquiry into respondent's emotional comprehension and state of mind before accepting his quasi-suicidal guilty plea and waiver of counsel. *Compare Drope*, 420 U.S. at 181 ("Even when a defendant is competent at the commencement of trial, a

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[19] Indeed, even after respondent informed the court that he was presently taking medication, the trial court did not even pause long enough to ask a single follow-up question in order to ascertain the identities and dosages of the medications or to inquire into their possible impact on respondent's thought processes or mood. Certainly, the impact of medication on a defendant's competence – particularly on his ability to cooperate with counsel – cannot be gainsaid. *Riggins v. Nevada*, 112 S.Ct. at 1817-20 (Kennedy, J., concurring).

Clearly, had this plea been tendered in federal court, the trial court's failure to follow up with specific inquiry into defendant's medications and their effects on him would have resulted in flat-out reversal and vacatur of the plea. *See, e.g., United States v. Parra-Ibanez*, 936 F. 2d 588, 594-96 (1st Cir. 1991); *United States v. Rossillo*, 853 F.2d 1062, 1064-67 (2d Cir. 1988); *United States v. Cole*, 813 F.2d 43, 45-47 (3d Cir. 1987).

trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial").

Under *Pate, Drope* and especially *Westbrook*, the trial court committed clear error in accepting this guilty plea and waiver of counsel without first having held a hearing and sought a more precisely focused psychiatric evaluation in determining whether respondent's obviously suicidal desire to plead guilty and discharge counsel was the product of mental illness, which seriously affected his ability to make a "reasoned choice" among the legal alternative available to him, as well as effectively rendering him unable to cooperate with counsel. *See Drope*, 420 U.S. at 176 (psychiatric evaluation must be properly focused on relevant legal inquiry).

While this Court has observed that the relationship between mental illness and suicide is problematic (*Drope*, 420 U.S. at 180-81 & n.16), there nonetheless exists substantial support in the psychiatric literature corroborating that certain categories of suicide (and suicidal behavior) are causally related to affective (mood) disorders.

Clinical research over the last thirty years has conclusively confirmed the close correlation among manic-depressive illness, alcohol and drug abuse and suicide. *See, e.g.*, Frederick K. Goodwin and Kay R. Jamison, *Manic-Depressive Illness* 210-226 ("Alcohol and Drug Abuse in Manic-Depressive Illness") (1990); *id.* at 227-244 ("Suicide"); *American Psychiatric Press Textbook of Psychiatry* ("Am. Psych. Text.") 1021-35 (John A. Talbott, Robert E. Hales, Stuart C. Yudofsky, eds. 1988) (affective illness, substance abuse and suicide) (collecting authorities); Kay

Redfield Jamison, *Touched With Fire: Manic-Depressive Illness and the Artistic Temperament* 37-47 & nn. 74-108 (collecting authorities) (1993).

These research studies indicate that manic-depressive illness and substance abuse are associated with more than two-thirds of all completed suicides; affective illness, usually major depression, is identified in 40 to 80 percent of the victims in two major studies and alcoholism in 20 to 30 percent. *Am. Psych. Text., supra*, at 1025-26 (collecting authorities); Goodwin & Jamison, *supra*, at 227-44 (collecting authorities); Jamison, *supra*, at 37-47 (collecting authorities). Moreover, these studies are quite consistent in finding elevated rates of alcohol and drug abuse in individuals with manic-depressive illness in both the manic and depressive phases. Goodwin & Jamison, *supra*, at 210-26; Jamison, *supra*, 37-39 & nn. 74-86. As one leading researcher recently noted (Jamison, *supra*, at 41-42):

> In addition to drinking and using drugs to excess, individuals with depressive and manic-depressive illness are also far more likely to commit suicide than individuals in any other psychiatric or medical risk group. The mortality rate for untreated manic-depressive illness is higher than it is for many types of heart disease and cancer.
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> * * *
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> Suicide, for many who suffer from untreated manic-depressive illness, is as much "wired" into the disease as myocardial infarction is for those who have occluded coronary arteries. Because suicide appears more volitional, somehow more existentially caused, and more tied to external circumstance than it often actually is,

> the seriousness of manic-depressive illness as a potentially lethal medical condition is frequently overlooked.[20]

The trial court's complete failure even to consider the impact of respondent's severe depression on his clearly suicidal "volunteering" for execution – particularly where the issue was flagged in the earlier psychiatric evaluations – was clearly violative of *Pate, Drope* and *Westbrook*. In assessing the substantial impact of depressive disorders (and suicidal ideation) on a defendant's ability to participate meaningfully in his defense, the "Competency to Stand Trial Instrument," designed by Dr. Louis McGarry and the Laboratory of Community Psychiatry of the Harvard Medical School, lists thirteen functions "related to what is required of a defendant in criminal proceedings in order that he may adequately cope with and protect himself in such proceedings." Among these is the category "self-defeating v. self-serving motivation (legal sense)." Laboratory of Community Psychiatry, Harvard Medical School, Final Report, *reprinted in* Center for Studies of Crime and Delinquency, National Institute of Mental Health, *Competency to Stand Trial and Mental Illness* 99-103 (1973).

As described by the Laboratory, this coping mechanism often is manifested by the intentional abandonment of legal safeguards (*id.* at 103):

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[20] For an ineffably graphic factual account of the impact of severe depression on a capital defendant's suicidal waiver of rights (albeit in a postconviction context), *see Rumbaugh v. Procunier*, 753 F.2d 395, 397, 399-403 (5th Cir. 1985); *see also id.* at 403-10 (Goldberg, J., dissenting).

> This item calls for an assessment of the accused's motivation to adequately protect himself and appropriately utilize legal safeguards to this end. It is recognized that accused persons may appropriately be motivated to seek expiation and appropriate punishment in their trials. At issue here is the pathological seeking of punishment and the deliberate failure of the accused to avail himself of appropriate legal protections. Passivity or indifference do not justify low scores on this item. Actively self-destructive manipulation of the legal process arising from mental pathology does justify low scores.[21]

Indeed, this case stands in marked contrast with *Alford's* observation that a guilty plea should be viewed as "the product of a free and rational choice, especially when the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." 400 U.S. at 31. Here, of course, respondent went effectively unrepresented at the plea, discharging counsel specifically to prevent them from acting in his interests at plea and sentencing. By no conceivable stretch of the imagination, then, could this non-plea bargained guilty plea to three capital murder charges and waiver of counsel be deemed to have been to

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[21] *See* Bonnie, 47 U. Miami L. Rev.; Ms. 11 ("the underlying issue is whether the defendant has the abilities needed for self-interested decision-making"); *see also*, in this regard, the analogous psychiatric authority cited at 28-29 n.9 of the Solicitor General's Brief, as well as the Solicitor General's concession that "the 'volitional' or 'affective' aspects of a defendant's capacity to participate in the trial process . . . are inherently part of the assessment of a defendant's competence to stand trial." (*Id.* at 28).

respondent's advantage. *See especially United States v. Johns*, 728 F.2d 953, 956-57 (7th Cir. 1984) (defendant's waiver of counsel, monosyllabic responses at colloquies, silence at sentencing and guilty plea at early stage of proceedings with no attempt at plea bargaining raised bona fide doubt about her competence).

Nor was the trial court's actual colloquy with respondent adequate to elicit all the relevant facts and circumstances surrounding what one court has referred to as a "defendant's basic desire to commit suicide" with "the cooperation of the State in that endeavor" (*People v. Chadd*, 621 P.2d at 839). *See also Faretta*, 422 U.S. at 840 (Burger, C.J., dissenting) ("The system of criminal justice should not be available as an instrument of self-destruction").

As this Court has framed the relevant inquiry, "[t]he question is not *whether* the petitioner made a knowing decision ... but *why*." *Harrison v. United States*, 392 U.S. 219, 223 (1968) (emphasis in original). *See also United States ex rel. Brown v. LaVallee*, 424 F.2d 457, 460 (2d Cir. 1970).

Here, the "why" went effectively unanswered, largely because the trial court failed to conduct a properly exhaustive inquiry. *See United States v. Kincaid*, 362 F.2d 939, 941 (4th Cir. 1966) (Rule 11 "requires something more than conclusionary questions phrased in the language of the Rule. It contemplates such an inquiry as will develop the underlying facts from which the court will draw its own conclusions.") *See also* Note, *Competence to Plead Guilty: A New Standard*, 1974 Duke L.J. 149, 158-59 (customary plea colloquy, which ordinarily focuses on the

impact of external factors on defendant's decision, not necessarily adequate to probe defendant's state of mind or mental capacity as it affects plea or waiver).[22]

Clearly, the trial court's *Westbrook* inquiry was wholly inadequate in this case. Its reliance on earlier psychiatric evaluations of respondent's competence was wholly misplaced – both because the psychiatrists had evaluated respondent only with respect to his competence to stand trial and face adversarial proceedings with counsel – not waive his legal rights self-destructively – and because they had never evaluated respondent with respect to the impact of medication on his competence to make decisions and work in a cooperative manner with counsel. Given respondent's psychiatric profile – as set forth in both doctors' reports – the trial court's summary plea colloquy in this case was wholly inadequate to satisfy even the foundational competence standard of *Dusky, Pate and Drope*, much less the particularized inquiry demanded by *Westbrook*.

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[22] *See also State v. Chavis*, 644 P.2d 1202, 1205 (Wash. Ct. App. 1982) (emphasis in original):

> Since the question ultimately is the *subjective* understanding of the accused rather than the quality or content of the explanation provided, the court should question the accused in a manner designed to reveal *understanding*, rather than framing questions that call for simple "yes" or "no" response.

II. THE FEDERAL COURT PROPERLY MADE AN INDEPENDENT DETERMINATION OF COMPETENCE AND VOLUNTARINESS WHERE THE STATE COURTS RELIED ON AN INCORRECT LEGAL STANDARD, WHERE MATERIAL FACTS WERE NOT ADEQUATELY DEVELOPED AND WHERE THE RECORD AS A WHOLE DID NOT SUPPORT THE STATE'S DETERMINATION

Petitioner belatedly[23] claims that the state court's 1987 postconviction habeas findings retrospectively cured the constitutional deficiencies in the trial court's failure to conduct a contemporaneous inquiry into respondent's competence at the time of his 1984 plea and waiver. Based upon these state postconviction proceedings, Petitioner asserts that the federal court of appeals should have been precluded from making an independent inquiry into the factual and legal basis for respondent's constitutional claims.[24]

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[23] As a preliminary matter, it is questionable whether this issue is even properly before the Court. As conceded by *amicus* Criminal Justice Legal Foundation (CJLF Br. at 4-5), the issue was not raised as a Question Presented either in the petition for certiorari or in Petitioner's Brief. On that basis alone, the Court is justified in refusing to consider it. Robert Stern, Eugene Gressman, Steven Shapiro, *Supreme Court Practice* 363-64 (6th ed. 1986); *Irvine v. California*, 347 U.S. 128, 129 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari").

[24] While *amicus* CJLF similarly complains that the state courts are the "better" forum for the resolution of these legal questions, the short answer is that Congress, by its 1966 recodification of 28 U.S.C. §2254 and its subsequent repeated refusals to adopt more deferential standards of review, obviously intends that federal courts should continue to have plenary power to relitigate constitutional questions that have nonetheless previously received state court consideration. *See Wright v. West*, 112 S.Ct. at 2497-98 (O'Connor, J., joined by Blackmun and Stevens, JJ., concurring).

This is disingenuous in the extreme. As the court of appeals quite properly determined, the state postconviction proceeding was not entitled to the degree of deference ordinarily accorded under 28 U.S.C. §2254(d) because its ruling was premised on the wrong legal standard, material facts were not adequately developed in the state courts and, when reviewed under the proper standard, the record as a whole simply did not demonstrate that respondent was competent to waive his rights. (Pet. App. A15-A16, A20-A28).

While a federal habeas court ordinarily must accord deference to findings of fact made by the state courts after full and fair hearings (28 U.S.C. §2254(d)), no presumption of correctness applies where the state courts have utilized an erroneous legal standard, where the material facts have not been adequately developed or where the state court record, as a whole, does not fairly support the state court's factual determination. 28 U.S.C. §2254(d)(1), (3), (6), (8). This federal deference to state court determinations, of course, applies only to matters of "historical" fact and to factual inferences to be drawn from historical fact; it does not apply to questions of law or to mixed questions of fact and law. *Miller v. Fenton*, 474 U.S. 104, 112-18 (1985); *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983).[25]

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[25] While federal courts must also accord deference to state court determinations of, e.g., demeanor, that does not mean

The voluntariness of a guilty plea (or waiver of other equally fundamental rights), however, is a complex determination that this Court has determined involves mixed questions of law and fact. Accordingly, voluntariness determinations are entitled to independent federal review. *Miller v. Fenton, supra; Marshall v. Lonberger, supra; see Boykin v. Alabama*, 395 U.S. at 243 (the ultimate "question of an effective waiver of a federal constitutional right in a proceeding is . . . governed by federal standards."); *Matusiak v. Kelly*, 786 F.2d at 543-45.

While competence to stand trial has been determined by this Court to be a question of fact subject to 2254(d)'s presumption of correctness (*Maggio v. Fulford*, 462 U.S. 111 (1983)), competence is nonetheless but one aspect of the global issue of voluntariness where guilty pleas and waivers of rights are involved. *Matusiak*, 786 F.2d at 543 ("for the plea to be voluntary, '[i]t is axiomatic' that the defendant must at least be competent to proceed (citation omitted); . . . must have an awareness of the true nature

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blind obedience. Even this Court has observed that demeanor evidence is by no means dispositive in competence determinations. *Pate*, 383 U.S. at 386; *see, e.g., Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("the trial court and Bouchillon's attorney did not have the extended contact of a full trial from which to evaluate his behavior, but rather only the limited contact pursuant to a guilty plea. Their observations concerning his demeanor must therefore be less meaningful."); *Griffin v. Lockhart*, 935 F.2d 926, 931 (8th Cir. 1991) ("although a trial court is better able than we are to judge the demeanor of an accused, the transcript reveals statements by Griffin that contribute to a doubt about his competency (e.g., addiction to medication, depression, threatened suicide)").

of the charge against him (citation omitted); have a 'rational as well as factual understanding of the proceedings against him' (citation omitted); and have knowledge of the nature of the constitutional protections he will forgo by entering his plea (citation omitted)"). Under these circumstances, it is clear that the intermingled questions of both competence and voluntariness affecting respondent's guilty pleas and waivers of counsel implicate serious questions of both fact and law.

Nonetheless, on the basis of this record, it is clear that the state courts misapplied the relevant standard of law, considering defendant competent for all purposes based strictly upon his having been examined by two psychiatrists – even though their examination was limited to his competence to stand trial with counsel. The psychiatric examiners, however, never were called upon to assess respondent's competence in light of his subsequent suicidal guilty plea and self-destructive discharge of counsel. Nor did the trial court conduct an independent assessment in light of these changed circumstances.

Irrespective of the competence standard ultimately settled upon, the record is clear that at no time did the state courts make the requisite inquiry into respondent's competence to waive counsel constitutionally compelled by *Westbrook*. The state court thus clearly erred when it improperly treated competence to plead guilty and waive counsel as resolved merely by reference to competence to stand trial, with no separate consideration given to a *Westbrook* inquiry. Moreover, given the shortcomings of the trial judge's fact-finding as well as the shortcomings of the psychiatric evaluations on which the state court relied – which were clearly material to the question

before the court – any state court determinations that relied upon them certainly would not carry the presumption of correctness. *Hays v. Murphy*, 663 F.2d 1004, 1008 n.4 (10th Cir. 1981); *Suggs v. LaVallee*, 570 F.2d 1092, 1113-15 (2d Cir. 1978); *Matusiak v. Kelly*, 786 F.2d at 544-45.

Nor did the postconviction hearing vitiate the taint. The state court's one sentence conclusion spoke only in terms of the *Dusky* standard and the court summarily ignored the corroborative medical records that were presented which confirmed respondent's testimony.

Accordingly, neither the one-sentence conclusion of the state postconviction court nor any findings of fact that can fairly be implied from it are thus entitled to deference because the state postconviction court used an incorrect legal standard. *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963); *Rogers v. Richmond*, 365 U.S. 534, 547 (1961).[26]

It is axiomatic, then, that the court of appeals was well within its authority to review and reassess the state court record in this case. The ultimate question of voluntariness of respondent's guilty plea and waiver of counsel was precisely the kind of mixed fact-law question that

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[26] Indeed, it is questionable whether, as a matter of law, the 1987 state postconviction court could meaningfully determine respondent's competence in 1984 in light of this Court's repeatedly expressed disinclination to sanction retrospective determination of competence years after the event. *Drope*, 420 U.S. at 183; *Pate*, 383 U.S. at 386-87.

calls for independent federal review. Insofar as the mental competence issue was intertwined with the voluntariness question, the state court's inadequate fact-finding and reliance on an improper legal standard deprived its competence determination of whatever deference it might otherwise have been accorded under 2254(d). In these circumstances, the court of appeals review of both questions was eminently proper.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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March 1993